Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT J. O'CONNOR,
AND NON-RETIRED
STATE TEACHERS RETIREMENT SYSTEM MEMBERS
WHO HAVE LEFT THE SYSTEM

Petitioners,

v.

THE STATE OF CALIFORNIA,
STATE TEACHERS' RETIREMENT SYSTEM,
THE ATTORNEY GENERAL OF CALIFORNIA,
JAMES MOSMAN, PETER HOUGH AND KEITH YAMANAKA
AS INDIVIDUALS AND OFFICIALS

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Rooker-Feldman doctrine prevents the federal courts from addressing federal constitutional due process violations and issues related to the abridgement of vested pension contract rights when state courts have refused to rule on those issues.

2. When legal scholars seem unanimous in their call for the overruling of the Rooker-Feldman doctrine, when the Ninth Circuit uses a blanket jurisdictional bar of cases initiated in the state courts because of Rooker-Feldman, and when other circuits have found a number of exceptions to the doctrine—should this Court clarify or eliminate this commonly used doctrine.

3. When the exceptions to the Rooker-Feldman doctrine in the various circuit courts are being applied in a grossly uneven manner, must this Court clarify that doctrine so that the citizens of the several states are accorded equal justice under Art. IV, Sec 2 (1)?

4. When a vested contract right is at issue—whether the undenied material perjury of the California State Teachers Retirement System's witness and the utilization of material *ex post facto* non-retroactive statutes by the appellate court render the whole series of cases, state and federal, *void ab initio* as current English law now holds.

5. When a vested pension rights case, initiated in a state court, is brought to a federal court to obtain constitutional rulings which the state courts refused to make—whether the federal court must consider a state statute, passed after the last state

decision and before the federal filing, when that statute completely clarifies the disputed non-statutory pension policy issues which were the subject of the state case.

6. Whether California teachers, professors and school administrators, covered under different retirement systems (State Teacher Retirement System [STRS] and the Public Employees Retirement System [PERS]) are similarly situated relative to vested pension rights under the California Constitution when they are all members of the state's public school system under Art. 9, Sec. 6 of the California Constitution, and are they similarly situated to private school teachers who are subject to ERISA rules?

7. Whether employers' contributions toward teachers' retirements in the California State Teachers Retirement System are deferred wages under the Internal Revenue Code 26 U.S.C. 411 and other federal laws and whether those employers' contributions must be reimbursed to vested members when those members leave the system before retiring.

8. Whether the Supreme Court should expand its uniquely American concept of *ex post facto* as applying only to criminal laws and forthwith include as *ex post facto* civil laws with retroactive application, as is now done by the World Court and the courts of the United Kingdom.

9. When defendants have not answered the adequate federal service of process does this negate the application of the Rooker-Feldman doctrine?

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OPINIONS BELOW

The decision of judges Choy, Skopil and Ferguson of the 9th District Court of Appeals of February 26, 2002 (unpublished) is found in Appendix C. The district court opinion of June 5, 2001 (unpublished) is at Appendix B, and the denial for rehearing by the Court of Appeals on April 16, 2002 is found at Appendix D

BASIS FOR JURISDICTION

The U.S Court of Appeals for the Ninth Circuit entered its opinion and order on February 26, 2002 and denied a timely petition for rehearing and rehearing en banc on April 16, 2002. Copies of the unpublished orders are found at Appendix B thru D. This petition for writ of certiorari is filed within ninety (90) days from the date that the rehearing was denied. It is timely filed. 28 U.S.C. 1254 confers jurisdiction on the Court

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION (See App A—for relevant texts)

—Article I, Sec. 9 (3) ex-post-facto laws.

—Article 1, Sec.10 (1) prevents ex post facto laws and laws impairing contracts.

—Article IV, Sec. 2 (1) The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states.

—The Fifth Amendment states in relevant part: "No person shall * * * be deprived of life, liberty, or property, without due process of law."

—The Fourteenth Amendment... nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any

person... equal protection of the laws."

FACTUAL BACKGROUND

Because of extremely high family expenses appellant, a college professor, took an additional teaching job as a substitute teacher in high school. The State Teachers Retirement System (STRS) considered this substitute teaching to be a full time job and notified the Los Angeles School District to deduct retirement contributions from this second job. The STRS then credited these mandatory deductions to his retirement account. Appellant's college teaching position was also covered by the STRS. The statutes mandated retirement contributions of 8% from employee's fulltime salaries and 8.25% from the employer. No contributions were allowed from summer school, overtime and other non-fulltime work. The substitute position became a full time teaching position at which appellant worked for 7 ½ years.

Appellant sought a pension, based on all of his statutorily mandated full-time retirement contributions from his college and high school teaching. The pension would have been approximately the same as that of a retiring junior high school vice principal. This was not disallowed by statute. The Retirement System (STRS) made a retroactive policy against it and did not make that policy known to other members of the retirement system, as required by law. (Bins v. Exxon [2000] 198 F 3d 1191). There was no statute against this possibility. It is now specifically required for STRS teachers (Education Code 22119.2-Stats 2000, Appendix A-5,6). The new statute requires retirement benefits to be paid based on all work—including evening and overtime. The pension which appellant sought was allowable to teachers and professors covered under another California pension system (Public Employees Retirement Sys-

tem—PERS) under Govt. Code 20635 when appellant worked and retired.

There were two series of California cases, the pre-retirement action, O'Connor 1, and a second series that attempted to right the due process wrongs of the first series of cases and to apply the post-retirement statutes after his retirement—O'Connor 2.

O'Connor 1. At the administrative law hearing, (July 1993) where all evidence used in all ensuing cases was presented, STRS offered perjurous testimony of the worth of the pension system. To show its poverty, the actuary understated the value of the STRS funds by $50 billion and testified that it would take 38 years to fund the system.(A-30) But the system was fully funded in 5 years at $104 billion.(A-32)

The perjurous testimony was not known to be perjurous by appellant until the correct figures were published in 1996. That testimony was material to the decision (App. A-26, p. 1626) being cited three times. (California Penal Code 125 states "An unqualified statement of that which one does not know to be true—is equivalent to a statement of that which one knows to be false.") STRS testimony also affirmed that administrators who quadrupled their salaries for only three years quadrupled their pensions under the law.

The appellate court in its note at p.1614 (App. A-23) states that while the case was pending the statutes were changed— but did not note that appellant had retired before the statutes were effective—more than two years prior to the appellate case. The changed statutes were thus *ex post facto*. The term *ex post facto* is understood to be primarily applied to criminal laws in the United States since *Calder v. Bull (1798—3 Dallas, 386)* but it is herein used in its traditional Latin meaning "from after the fact".

To bolster the *ex post facto* policy which the STRS had made for O'Connor it tied together three unrelated statutes. It borrowed the phrase "full time equivalent" from the school financing section of the Education Code. Section 41376 was not a statute related to pensions but rather to school funding from the government. It defined "full time equivalent" in terms of the total number of teachers an elementary or secondary school employed. It specifically did not apply to college teachers and appellant was a college teacher in the job referenced by STRS. The STRS reasoning then determined that the second full time position in a high school was "overtime" (Educ. Code 22135) but it was not accorded the premium pay required by the Fair Labor Standards Act nor by the California Education Code.

The STRS then utilized Education Code 22114 (now 22119.2) which at that time disallowed overtime pay from being credited toward retirement. That same statute now requires the crediting of all teacher pay toward retirement— including overtime, summer school, and extra full time work. (App. A-5,6)

The administrative ruling was that appellant's second full time job was "overtime" and ordered the STRS to return any excess contributions by October 23, 1993. The statutes mandated a return no later than the retirement date of January 4, 1994. The STRS ignored both mandates but in 1996 returned some of appellant's contributions but not his employers' contributions.

At the writ of mandate and appellate hearings appellant asked for rulings on Article I, Sec. 10 and the 14th Amendment. Neither were addressed by the courts.

In its appellate brief the Attorney General and STRS cited two non-retroactive *ex post facto* statutes (a revision of Education Code 22114 and a new statute, 22115.

The appellate court utilized those and another *ex post facto* statute (Educ. Code 22215) to make its determination. (App. E pp. 1614, 1620, 1623, 1625, A-34-25) Those three statutes were cited 10 times in the appellate decision and were critical and material to it.

These *ex post facto* statutes were not retroactive. The STRS sponsored AB 631, passed on September 9, 1993, and AB 1796, passed on October 8, 1993. (The O'Connor 1 administrative law hearing was held on July 27, 1993.) AB 631 was designed to change the wording of Education Code 22114, adding the term "full time equivalent" so that it would conform with the new STRS policy that was made for appellant. However it was replaced by another STRS sponsored bill, AB 1796 which was passed on October 8, 1993—and which returned to the original wording of the code section. "When later statute is enacted inconsistent with preceding statute and covering entire ground of subject matter, it supersedes and impliedly repeals preceding statute." (Govt. Code 9605) "The operative date of a newly passed statute is at least 90 days after it is signed." "Except as provided in paragraphs [2] and [3] of this subdivision, a statute enacted at a regular session shall go into effect on January 1 next following a 90-day period from the date of enactment of the statute." (Cal Const, Art IV, § 8 [c][1])

However AB1796 made other changes desired by STRS. When appellant worked and retired "creditable contributions" toward retirement were specified by the legislature in the statutes. AB 1796 added Ed. Codes 22115 and 22215 (App. E, A-25). These transferred to the STRS board the power to determine what contributions were creditable towards retirement. When appellant worked 22115 defined "county" and 22215 was non-existent. The STRS then introduced a bill to replace AB 631 which had been superceded by AB 1796.

This became law as Education Code 22119.2 on July 1, 1996, three months after the first appellate decision of March 28, 1996. The appellate decision had cited the wording of AB 631 which had been superceded.

Appellant gave his notice of resignation on November 11, 1993. This was acknowledged by the STRS on November 30, 1993. He continued working at his "overtime" high school job until the STRS determined that it was now a full-time job and that since he had retired he could earn only $16,000 extra per year. This forced him out of that job and into bankruptcy, losing the house that he had built with his own hands and leaving him with his pension as his only asset.

Of the three code sections used by the STRS to develop its *ex-post-facto* policy in July of 1993—Education Code sections 41376, 22135 and 22114— only 22135 (now 22151-the general definition of overtime) was cited in the appellate decision as it applied to the time of the first hearing. The fundamental statutes in the decision were all passed after the hearing and were not retroactive to the time appellant worked and retired or to the time of the administrative law hearing.

No California court at any level ruled on any federal constitutional provision, statute nor case law related to the issues presented. At the first administrative law hearing in July 1993, Article I, Sec. 10 and the 14th Amendment were presented. At the appellate hearing Article I, Sec. 9 and five federal cases were added. In the request for hearing to the California Supreme Court 13 federal statutes were added.

O'Connor 2. When the perjury and the retroactive application of the statutes were made known, appellant began a second challenge in the state courts because of the lack of constitutionally required due process in the first series of cases. This second series of cases also

added post-retirement issues which did not apply to him at the initial hearing because he had not yet retired. The complaint also included the question of whether the employer's contributions must have been returned to the employee when that employee would not receive retirement benefits from those contributions because of leaving the system before retirement or because of not receiving a pension based on those contributions at retirement (App. F., A-29). Another issue was whether the teachers and professors covered by STRS and PERS were similarly situated under the California Constitution and whether the STRS members should be allowed to apply all earned income as a basis for their pensions as the PERS teachers were allowed until July of 1994 under Govt. Code 20635. The courts in this series of cases ruled that the issues were *res judicata*—even the issues which had not been presented in the first series of cases: the constitutional issues, due process violations, the similarly situated question, the return of employers' contributions, and the post-retirement issues which mandated that appellant be paid what he had requested in his pre-retirement cases.

The second series of cases asked for constitutional due process interpretations on the after discovered constitutional violations of the first series of cases—the perjury and the application of non-retroactive statutes which violated the due process guarantees of the Fifth and Fourteenth Amendments and the prohibition of the abrogation of a contract by Art. I Sec. 10(1). At the administrative law hearing Art. I, Sec 10, Art. VI, Sec. 2, and the 5th and 14th Amendments were cited. These were repeated at each appeal level. The second appellate decision refused to consider the perjury issue (App. F., A-29) or the *ex post facto* civil laws that had been applied to the case—yet it referenced the perjurous

testimony and the ex post facto statutes in its decision. (App. F., A-28 citing p. 18)

Within three weeks of the last California hearing in January of 2000 the STRS backed bill, AB 2700, was introduced to the legislature. This backing of the bill evidenced a change in the policy relative to contributions creditable towards retirement. The bill was passed as Education Code 22119.2 (Stats. 2000). It allows for all income of teachers to be credited toward their pensions, including extra full-time work and overtime. The *ex post facto* policy which the STRS had applied to appellant, without the benefit of a statute, was now reversed by statute and allowed exactly what appellant had always held to be the law in his situation.

In order to obtain a decision on the due process issues, on which the California courts refused to rule but which are undenied by the defendants, O'Connor filed a federal action. He filed his complaint and served all defendants by certified mail with return receipts requested. He did this from Los Angeles on Nov. 8, 2000, from Atlanta on January 10, 2001, then since no defendant had answered, by personal service in Sacramento on April 7 and 9, 2001. Defendants did not timely answer any of these services. On May 1, 2001, without answering the complaint, defendants submitted two motions to the district court. Based on the untimely motion to dismiss, the district court entered its order based on the defendants' motion.

The issues raised in the federal court would be exceptions to the Rooker-Feldman doctrine in most or all other circuits-based on their decisions. Further a review of the state courts' decisions was not requested as it had been in Feldman (*Dist. of Columbia v. Feldman* (1983) 460 U.S. 462, 482) District court was asked to rule on the federal issues on which the California courts

refused to rule—due process and the retroactive application of statutes which abrogated a vested pension rights contract. The complaint also included a conspiracy issue, and named new defendants. (42 USCS 1983, 1985) The conspiracy was related to: the introduction of perjurous testimony and of *ex post facto* statutes in the "O'Connor 1" hearings; and the hiding from appellant and the appellate court in 2000 the change in STRS policy relative to having all income credited towards a pension for STRS members. (Educ. Code 22119.2, Stats. 2000; App. A-5,6) The policy had been changed months before the introduction of the bill in February 2000. The federal complaint included a class action for appellant and others who had been returned their own retirement contributions but not their employers' contributions when they were not to receive pensions from those contributions—such as when they left teaching or were refused a full pension.

The federal district court, prompted by the defendants' untimely motion to dismiss, dismissed the action under the Rooker-Feldman jurisdictional bar. It also found that *res judicata* applied. A motion for reconsideration, an appeal to the circuit court and a motion for a rehearing were all refused.

REASONS FOR GRANTING THE WRIT

Review should be granted because this Court has not resolved the important and recurring issues presented. The law of the circuits is unsettled and conflicting regarding both Rooker-Feldman and *res judicata* bars and whether they may be used to bar vested contractual pension rights cases when a state court has refused to rule on the constitutional issues raised. The issues presented are of great importance to the conduct and settlement of state court cases in which due process has not been observed or in which constitutional issues

presented to state courts have not been addressed and adjudicated. Accordingly, because the issues presented are recurring, important and unsettled, and the opinion of the Ninth Circuit Court of Appeals conflicts with decisions of other circuits and of this Court, the Court's review is warranted

Review should be granted to clarify the constitutional limitations of the Rooker-Feldman and *res judicata* doctrines and whether they are being correctly applied by the Ninth Circuit when its decisions conflict with other circuits, particularly in vested pension rights cases which are contractual between a state and its teachers. (*California Teachers Assn. v. Cory [State Teachers Retirement System the real party of interest]* 1984; 155 Cal.App. 3d 494). It appears that fundamental constitutional protections have been severely violated when vested contractual pension rights were dissolved by the perjury of a state witness and the state's application of non-retroactive *ex post facto* statutes. Constitutional protections were ignored by state courts, then by the federal courts. Both this Court and the several circuits have placed the constitutional protections relative to due process and abrogating a contract above the Court-made jurisdictional rules of Rooker-Feldman and *res judicata*. Must the Ninth Circuit follow?

Citizens deserve courts which protect them against their state governments. Professor Sherry writes that the Ninth Circuit has a "blanket refusal" to hear any case which may have begun in the state courts based on the Rooker-Feldman decisions. (S. Sherry. "Judicial Federalism in the Trenches: The Rooker-Feldman Doctrine in Action" [May, 1999] 74 Notre Dame L.Rev.1085, 1118) Other circuits have found a number of exceptions to a universal jurisdictional bar based on the actual Rooker and Feldman decisions and the protections of the U.S. Constitution.

The following factors should also be considered in granting the writ:

1. Legal scholars, almost universally, believe that the Rooker-Feldman doctrine is overused, underdefined, generally superfluous and should be overruled. (Infra p. 15-17; Scott C. Idleman, "The Demise of Hypothetical Jurisdiction in the Federal Courts" 52 Vand. L. Rev. 235, March, 1999) Litigants in the various circuits are being subjected to widely divergent interpretations of the Rooker and Feldman decisions. Most circuits' find a number of exceptions which are implicit in the Rooker and Feldman decisions particularly in the First, Second, Third, Fourth, Seventh and Eleventh Circuits. In the federal case for which this writ of certiorari is sought, the facts, statutes, parties and issues vary considerably from the initial state hearing. Any of these has been found to be an exception to the Rooker-Feldman doctrine in some circuits, but the blanket proscription of the Ninth Circuit against the federal hearing of any issues which may have been presented to the state courts—even when not adjudicated or even when a review of the state court's decision is not sought, denies citizens of the Ninth Circuit constitutional and vested rights which citizens in other circuits enjoy. This is in violation of Article IV, Sec. 2 of the U.S. Constitution.

2. As the common law shifts to afford greater justice to citizens, the court may reconsider its earlier pronouncements. For example, the highest British court, the House of Lords, recently ruled that a case will be *void ab initio* because of violations of due process. *(Anisminic v. Foreign Compensation Comm. [House of Lords, 1969] 2 AC 147, [1969]* and *Palacegate v. London Borough, 1999).*

In *Moore v. East Cleveland (1977) 431 U.S. 494*

Justice White wrote:

> The emphasis of the Due Process Clause is on "process." As Justice Harlan observed, it has been "ably argued in response to what were felt to be abuses by this Court of its reviewing power, that the Due Process Clause should be limited to a guarantee of procedural fairness."

It may also be time to change the court's traditional position on *ex post facto* passed laws as applying only to criminal cases. Since *Calder v. Bull* some justices and commentators, and at least one Supreme Court case (*Ex parte Garland ([1866] 71 U.S. 333),* have disagreed with the Court's rulings that *ex post facto* laws apply only to criminal cases. Some, such as Justice Clarence Thomas (*Eastern v. Apfel ([1998] 524 U.S. 498*), seem to seek a broader application of the term to include civil cases. James Madison agrees as to the constitutional meaning (Federalist, No. 44) in which he does not mention criminal behavior relative to *ex post facto* laws, but rather "personal security and private rights."

3. When the protection of vested pension rights or civil rights is at stake, the federal courts should be able to consider the improprieties of the perjury of state officials, relative to due process, when that perjury has been sanctified by the California courts. Hamilton wrote:

> "The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial speaks for itself. No man ought certainly to be a judge in his own cause, . . . This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their citizens. . . it is natural that the judges, as men, should feel a

> strong predeliction to the claims of its own government." (Federalist, No. 80)
>
> "I perceive at present no impediment to the establishment of an appeal from the State courts to the subordinate national tribunals; and many advantages attending the power of doing it may be imagined." (Federalist, No. 82)

It would seem that the California courts and legislature may well have employed this type of bias by state employees since appellant was a citizen against his state. The case was prosecuted and ruled on by state employees.

4. If it is true that when state courts have refused to make an appealable ruling relative to the due process violation of the state's perjury, which was impossible to prove until the correct facts were published several years later, and when the state courts utilized *ex post facto* statutes which were then, in subsequent hearings, sanctified through *res judicata* rulings—that lack of due process should be subject to lower federal court revue. The federal courts should be allowed to ascertain the constitutionality of the state courts' decisions and make rulings that might be appealable.

5. When the initial administrative law hearing, at which all evidence was taken, included perjurous testimony, material to all successive decisions, federal courts should be able to review the due process implications when California courts have refused to rule on the "after discovered fraud" or on any constitutional issue.

6. When California courts have sanctioned the impairing of a teacher's vested pension contract with his state by applying *ex post facto* statutes which were material to the original appellate decision, then the California courts refused to rectify this due process

violation— the lower federal courts should be allowed to examine the due process issues.

7. While judicially instigated bars to subsequent actions, such as *res judicata* and Rooker-Feldman, are useful to lighten judicial case loads when the earlier actions were heard on the merits, if justice is to be accorded, particularly when vested contractual pension rights are involved, the constitutional rights to due process must be protected. This Court should make clear to the federal and state court systems the criteria necessary to balance the requirements of due process with the efficiency of the court systems.

Only the U.S. Supreme Court can clarify what exceptions exist to the blanket denial of district courts hearing cases that may have some similarity to a case already decided in a state court. Only the U.S. Supreme Court can decide whether a district court must evaluate the facts of a case before finding that any issues once heard, but not adjudicated, in a state court cannot be presented to a district court. Only this Court can require the circuit courts to evaluate the qualitative and quantitative differences between issues presented to the state courts and any related or non-related issues presented to the federal courts.

Based on a misreading of the Rooker and Feldman cases, the Ninth District Circuit Court has denied a citizen's constitutional guarantees of due process when these guarantees have been abrogated by a state court. Rooker required a "due" hearing on the merits. Also both Rooker and Feldman specifically asked for a review of the state courts' decisions by the federal courts. Appellant has sought only a review of due process.

Rooker-Feldman May Prevent Federal Courts from Correcting Major State Court Errors. The Ninth Circuit has adopted a "blanket application" of the doctrine,

and most of its decisions have been unpublished. Law professors, as evidenced by law review articles, believe that the Rooker and Feldman cases are overused and often deny the justice that the Constitution requires.

A review of 113 law review articles which cited the Rooker-Feldman doctrine found that those authors who analyzed the doctrine were of the unanimous opinion that the Rooker-Feldman doctrine was superfluous. Most Rooker-Feldman related decisions are unpublished and do not address the constitutional issues presented to the federal courts.

> "The Rooker-Feldman doctrine itself is inconsistent with federal preclusion principles and should be abandoned. . . The doctrine is of dubious pedigree; any valid interests that it advances, such as finality or proper relations between the federal and state court systems, are already addressed through preclusion rules." Beermann, J. "Government Official Torts and the Takings Clause. State Sovereign Immunity." 68 Boston.U.L.R 277 (Mar. 1988)

Benjamin Smith in "Casenote: *Texaco, Inc. v. Pennzoil Co.*: Beyond a Crude Analysis of the Rooker-Feldman Doctrine's Preclusion of Federal Jurisdiction" (41 U. Miami L. Rev. 627, Jan. 1987), concluded that "one may reasonably reach the conclusion that the Court in both Rooker and Feldman was simply wrong." Professors Friedman and Gaylord stated "Feldman itself should be overruled. The Rooker-Feldman doctrine should be abolished." (Friedman, B. & Gaylord, JE "Rooker-Feldman, from the Ground Up." (74 Notre Dame LR, May, 1999 pp 1129, 1134) 74 Notre Dame Law Review was devoted to Rooker-Feldman problems with many legal scholars participating, including: Thomas D. Rowe, Jr.; Suzanna Sherry; Susan Bandes; Jack M. Beermann. (See also: McLain, A.; Smith, B.; Hon. G. Proctor;

Althouse, A. (See Table of Authorities for full references.)

Professor A.R. Amar, of the Yale Law School criticizes Rooker-Feldman:

> To make matters even worse, the Court has shown great hostility to the idea of lower federal court review of state courts, and has even given this hostility a new name: Rooker-Feldman. The transubstantiation [*1536] of *Rooker v. Fidelity Trust Company* — a justly forgotten opinion by Justice Van Devanter, nowhere even cited in the encyclopedic first and second editions of *Hart & Wechsler* — into a "classic" of federal jurisdiction is curious indeed. It is not entirely clear what *Rooker* stands for — or more to the point, what the current Court will *say Rooker* stands for — but whatever it is, "Rooker-Feldman" seems either unnecessary or misguided. ... What's more — and more central to our purpose here — *Rooker* is technically wrong on its own terms for it claims that under the statutory jurisdictional scheme Congress has created, federal district courts have only original jurisdiction, never appellate jurisdiction over state courts. But as Story's opinion in *Martin* makes clear, lower federal courts have *from the very beginning* exercised appellate jurisdiction, strictly speaking, over state courts. Today, the categories of appellate jurisdiction are far more extensive than in 1789. (138 U. Pa. L. Rev. 1499, June, 1990)

The original Rooker and Feldman cases make some sense. Rooker ruled that if a "due" hearing was held then the Federal courts need not rehear the valid state decision. (Rooker v. Fidelity Trust (1923) 263 U.S. 413, 415) That "due" hearing, ostensibly a hearing which was "heard on the merits, was fully and fairly litigated,

and in which due process protections were observed." (See: *Centifanti v. Nix [3d Cir. 1989] 865 F.2d 1422, 1433; Wood v. Orange County [11th Cir. 1983] 715 F.2d 1543, 1546-7*) In Feldman, however, even a "general Constitutional challenge to a bar admission rule" allowed the federal courts to become involved. "The state proceeding must give the parties a "realistic opportunity to fully and fairly litigate" their claims for the court to apply abstention. If the parties did not have this opportunity in the state system, the federal court need not abstain." (Robertson, ML. "Winning at All Costs: Election Fraud in the Third Circuit: Marks v. Stinson" 40 Vill. L. Rev. 869 (1995) Similarly, giving "full faith and credit" (28 U.S.C.S. 1738) to a state court decision is not mentioned in either Rooker nor Feldman.

A Decision on Federal Issues Must Be Made Below Before Appealing to the Supreme Court . "The court does not decide in the first instance issues not decided below." (*NCAA v. Smith [1999] 525 U.S. 459*) No California court ruled on any federal law, including the Constitution—nor did they rule on any post-retirement issue. So there was no appealable ruling. The "O'Connor 2" line of cases attempted to get the California courts to rule on the due process deprivations of "O'Connor 1", but to no avail. There must therefore be a ruling by the federal court which may or may not then be appealed. (See also: *Lorillard Tobacco Co. v. Reilly, Attorney Gen. Of Mass. (2001) 533 U.S. 525)*

In Feldman (at 462) this Court ruled that: "28 U.S.C.S. 1257(3) authorizes the United States Supreme Court to review only judgments in state court cases in which a federal issue was raised and adjudicated." Similarly, In *Hickel v. Oil Shale Corp (1970) 400 US 48* the ruling stated: "to the extent that such contest proceedings are found void, not controlling, or subject to review, all issues relevant to the invalidity of the claims will be

open..." Also in Po*well v. Nevada (1997) 114 S.Ct. 1280* it was ruled: "because that issue was not raised, argued, or decided below, the Supreme Court should not settle the issue in the case at hand.

No federal constitutional provision, statute nor federal case was addressed in any of the California decisions, yet these decisions were the basis for the Rooker-Feldman application which foreclosed addressing all federal questions on which the state courts had neglected to rule.

The scarcity of Supreme Court opinions (three) discussing the Rooker-Feldman doctrine contrasts sharply with the doctrine's treatment in lower federal courts, where it has experienced "explosive growth." "Despite this growth - or perhaps because of it - the scope of the doctrine remains unclear, as lower courts have created a "complex, confusing, and sometimes contradictory body of precedent."... "Many courts are confused and consequently are misapplying the doctrine." (McLain, supra)

In Feldman (*Dist. Of Columbia v. Feldman (1983) 460 U.S. 462*) the decision specifically referred to the retroactive application of laws and claims made below and the requirement that federal issues raised must be adjudicated:

> Constitutional Law: Jurisdiction: Judicial inquiry investigates, declares and enforces liabilities as they stand on present or past facts and <u>under laws supposed already to exist</u>. That is its purpose and end. Legislation on the other hand looks to the future and changes existing conditions by making a new rule to be applied thereafter to all or some part of those subject to its power. (Emphasis added.)

Then under 6B the Feldman Court remanded the

federal issues to the federal court because "The District Court has subject-matter jurisdiction over these elements of the respondents' complaints."

The Supreme Court has been clear on the due process guarantees of the Constitution but lower courts, possibly due to expediency or to the pressure from governmental agencies, may not only vary from the constitutional guarantees in original instances but may also illegally affirm their due process violations in ensuing decisions. The Supreme Court must protect the citizens in such cases in order to continue its constitutional mission.

> No State shall deprive any person of life, liberty, or property, without due process of law. U.S. Const. Amend. 14 para.1. That guarantees more than fair process and bars certain governmental actions regardless of the fairness of the procedures used to implement them. . . The touchstone of due process is protection of the individual against arbitrary action of government. (*Cnty. of Sacramento v. Lewis [1998] 523 U.S.833*)

> "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury (such as when) a state's power is used as an instrument for circumventing a federally protected right." (*Baker v. Carr [1962] 369 U.S. 186*)

The application of statutes which were passed after the original state hearing and were not retroactive in their application violated the constitutional requirement relative to impairing contracts in the "O'Connor 1 appellate decision. The District Court's order, and those of the state courts, violate the due process and takings guarantees of the United States Constitution since appellant has yet to have a hearing on the due

process or the post-retirement statutory contractual issues. All of the evidence so far ruled on was presented in the first administrative law hearing in 1993 where the perjury occurred.

"*Ex post facto*" literally means "after the fact" or in a legal sense, laws made after an otherwise innocent action. The Constitution is clear that no such laws may be passed. Neither the Constitution nor James Madison's comments on that supreme law (Federalist, No. 44) limit such laws to the criminal sector, although that has been the traditional interpretation of the Supreme Court since *Calder v. Bull.* However many judges have opined that non-retroactive civil laws should be covered under the general *ex post facto* proscription.

In *Ex parte Garland (supra)* the requirement to take an oath in order to practice before the courts was found to be *ex post facto* because it took away property rights. The dissent by Justice Miller criticized the decision because not taking an oath can not be considered to be criminal. So if it was a civil action, the Supreme Court applied an *ex post facto* law to a civil case.

The same year the House of Lords ruled, in *Williams v. Harding (1866) House of Lords (LR) 1 H L 9,* that civil *ex post facto* legislation was illegal. Does not the taking of vested property rights in the instant case qualify under the reasoning in Garland and Williams?

In *Lessee of Livingston v. Moore (1833) 32 U.S. 469* the discussion criticizes the *Calder v. Bull* approach.

> Whether an act of legislation must be contrary to the constitution as well as first principles, and whether all ex post facto legislation of the states is void, are questions upon which the federal judges have not been perfectly agreed. Judge Chase affirms these positions; Judge Iredell denies them in

Calder v. Bull, 3 Dall. 388, 389; Judge Patterson's argument in Vanhorn v. Dorrance, strongly implies his agreement with Judge Chase, with whom Chief Justice Marshall agrees; indeed, it appears to be the judgment of the court, in Fletcher v. Peck, 6 Cra. 132, 133, 135.

Judge Johnson strenuously asserts, that the constitution of the United States forbids all ex post facto legislation, civil as well as criminal. . . Judge Brackenridge says, that the notion of confining ex post facto to criminal laws, is merely American. Certainly such is not the language of the constitution, nor the spirit, the reason, or the policy. At least, when states are parties to a contract, they ought not to be permitted to enact ex post facto laws.

. . . It is a first principle of the jurisprudence of all free people, having written constitutions, that legislation must be prospective and general, not retrospective or individuated. . . . It is high time to restore the true sense according to the plain language of the constitution, prohibiting all *ex post facto* legislation, instead of confining it to criminal cases, as has been generally done,

The material perjury in the original administrative law case should have been corrected at the federal level when the state courts refused to correct this due process violation. In *People v. Quartermain ([1997] 16 Cal. 4th 600, 607)* the California Supreme Court ruled that the government's prosecuting attorney's perjured testimony before the trial was "fundamentally unfair and a violation of defendant's federal constitutional right to due process of law. (U.S. Const., 14th Amend.)" . . . "Because we cannot conclude beyond a reasonable doubt that the error was harmless, we reverse the judgment in its entirety." Such perjury goes to the merits of the case.

"Where the government knowingly permits the introduction of false testimony reversal is virtually automatic." (*U.S. v. Moreno [1999 Second Cir.] 181 F.3d 206)* In appellant's state court cases the undisputed perjury was ignored and not ruled on.

Perjury alone may make a state judgment *void ab initio*. (*U.S. v. Hembree [1985 10th Cir.] 754 F.2d 314)* In *Catz v. Chalker ([1998, 6th Cir.] 142 F.3d 279*) the court ruled that if state judgment was "unconstitutionally obtained" it is sufficient to overcome the Rooker-Feldman doctrine—"federal court may entertain a collateral attack on a state court judgment which is alleged to have been procured through fraud, deception, accident, or mistake." *Rooker-Feldman* does not apply if plaintiff claims "that people involved in the decision violated some independent right of his, such as the right to be judged by a tribunal that is uncontaminated by politics, then he can, without being blocked by the *Rooker-Feldman* doctrine, sue to vindicate this right." In *Youngblood v. Lynaugh (1989, 5th Cir) 882 F.2d 956*, the *ex post facto* application of a law rendered the decision *void ab initio*.

Due process must be accorded. A "due" hearing must be held. *(Rooker*, supra*; Parkview v. City of Lebanon (2000, 3d Cir) 225 F.3d 321*)

> . . . the appellants' allegations of a due process violation are sufficient to avoid dismissal under the Rooker-Feldman doctrine. The appellants have made clear that their complaint in this case does not contest the finality of the Kansas Supreme Court's decision in CIG III, but rather, they complain about the procedural fairness of Kansas' review of claims in subsequent proceedings. (*ANR v. Lavaver [1998,10th Cir.] 150 F.3d 1178*)

Must a Federal court evaluate the constitutional questions raised before applying the Rooker-Feldman abstention doctrine? The decision of the Ninth Circuit misapplied its own due process decisions in the instant case. The citations utilized by the appellate panel do not answer the challenges brought in the appeal. The appeal dealt with the process of the state court's decision and the fact that it had utilized perjury and the application of statutes that were not retroactive which violated the "contracts protection" clause of the Constitution. Every California court refused to address the federal constitutional issues. The federal appeal was not seeking a review of the state courts' decisions but on the Constitutional improprieties and the failure of the state courts to address those Constitutional rights. These deprived O'Connor of due process in the first series of hearings (O'Connor 1), then again in O'Connor 2 when the due process violations in O'Connor 1 were addressed. The refusal of state courts to rule on any of the federal issues has been found to be an exception to Rooker-Feldman.

In the Ninth Circuit decision (App. C, A-18) none of the issues presented for review were answered by the appellate panel's decision. Its two Rooker related citations were inapposite: *Ahmed v. Washington (2001, Ninth Cir.) 262 F.3d 979* dealt with First Amendment rights not due process; *Doe & Assoc. v. Napolitano (2001 9th Cir) 252 F.3d 1026* dealt with legal ethics issues, not due process. As opposed to the O'Connor cases, in which the state courts did not rule on any federal issues— in Doe, the court had made such rulings:

When the original hearing, at which all evidence was presented, was tainted by material perjury, does the Rooker-Feldman doctrine sanctify that due process violation? The Ninth Circuit in *Clements v. Airport*

Auth. (1995) 69 F.3d 321 ruled that "Moreover, any bias in the administrative process . . . was not "cured" by the subsequent judicial review in state court. Then citing *Ward v. Village of Monroeville (1972), 93 S.Ct. 80* "Generally, an adjudication that is tainted by bias cannot be constitutionally redeemed by review in an unbiased tribunal." Then citing *Marshall v. Jerrico ([1980] 446 U.S. 238)* "Indeed, the requirement that proceedings which adjudicate individuals' interests in life, liberty, or property be free from bias and partiality has been 'jealously guarded.'" However the blanket Rooker-Feldman bar of the Ninth Circuit seems to be antithetical to that court's ruling in *Clements*.

When the exceptions to the Rooker-Feldman doctrine in various circuit courts are being applied unevenly must this Court clarify that doctrine so that the citizens of the several states are accorded equal justice under Art.IV, Sec2-1? County Attorney Brody, CE. in "Abstention In The Federal Courts." 13 St. Thomas L. Rev. 539 (Winter 2001) writes:

> This creation of exceptions and divergences is troubling based on the fact that the Rooker-Feldman doctrine is almost completely based on the decisions of the federal circuit courts of appeals. Therefore, at this point it will be assumed that in a vacuum, Rooker-Feldman would direct the federal courts to abstain from exercising their jurisdiction regardless of the nature of the case."

When other circuits find many exceptions to the so called Rooker-Feldman doctrine are citizens whose cases are heard in the Ninth Circuit deprived of Article IV, Section 2 (1) rights and XIVth Amendment rights under the U.S. Constitution—rights which citizens in other circuits are allowed. Appellant O'Connor has not sought a federal review of the state cases as had both

Rooker and Feldman. He has sought a decision on federal Constitutional issues on which the state courts refused to rule. The problem with the application of Rooker-Feldman is not the unnecessary review of a state court decision, but rather exactly what is meant by "inextricably intertwined". Circuit courts have ruled that: (a) adding new plaintiffs or defendants in a federal case removes the "intertwinement" possibility; (b) a violation of due process will also except Rooker-Feldman; (c) state cases must be actually decided; (d) considering the merits of the state court decision is acceptable; (e) issues raised in the state court are required to have been ruled on; (f) the state must rule on prior injury which state court failed to remedy.

The Rooker-Feldman doctrine makes sense when properly applied. Rooker required a full state hearing and adjudication of all the issues and that due process be accorded. Feldman required federal courts to rule on federal issues not ruled on by the state courts. The problem is that not all state court decisions have followed these due process requirements. This has allowed for a number of exceptions to any blanket dismissal of all state court cases seeking federal decisions.

1). Actual decisions must be made on the merits. "A federal district court may exercise review of alleged federal constitutional due-process or equal protection deprivations in the state's adoption and/or administration of general laws." (*Johnson v. Rodrigues [2000, 10th Cir.] 226 F.3d 1103; Feldman (supra) 484; 28 U.S.C. 1331*

2) Issues raised must be ruled on (the reasonable opportunity exception). The post-retirement issues in O'Connor-2 were never ruled on, nor were the federal issues in "O'Connor 1 or 2" Rooker-Feldman did not bar district court where "the claims had not been determined by the state court, nor were they inextricably

intertwined with a prior state court decision." (*Marks v. Stinson [1994, 3d Cir] 19 F.3d 893* cited in: *Rivers v. McLeod [2001, 2nd Cir.] 252 F.3d 99.*) "It is the general rule that issue preclusion attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment."(*Arizona v. Calif. [2000] 530 U.S. 392)* The O'Connor-2 decision erroneously stated that O'Connor "acknowledged" that he had not utilized federal laws in O'Connor-1. The court was not correct—as evidenced by the citing of federal law in every O'Connor-1 hearing. The claim in the present case cannot be inextricably intertwined with the state case because the state courts refused to rule on the issues presented. (*Evers v. Outagamie [1999, 7th Cir.] 202 F.3d 272; NAACP v. Alabama [1964] 377 U.S. 288.*)

3) Due process violations in state courts must be rectified. (*ANR v.Lafaver, supra) Brinkerhoff-Faris Trust v. Hill ([1930] 281 U.S. 673)* held that a state may not, "consistent with due process, deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy." (*Whiteford v.Reed [1998 3rd Cir.] 155 F.3d 671)* Relative to proceedings in state courts, federal courts' authority is limited to enforcing commands of the U.S. Constitution." (*Dickerson v. U.S. [2000] 530 U.S. 428; Smith v. Phillips [1982] 455 U.S. 209*) When state court's rulings have been "alleged to be, or are actually, based on fraud, deception, accident or mistake it can be reviewed by the federal court."(*Resolute Ins. Co. v. North Carolina [1968, 4th Cir] 397 F.2d 586.* This was applied to Rooker-Feldman in *Jordahl v. Democratic Party (1997, 4th Cir.) 122 F.3d 192*,193 "A distinction must be made between actions seeking review of the state court decisions themselves and those cases challenging the constitutionality of the process by which the state court decisions resulted."

4) Federal courts are not precluded from examining state decisions when the issues are not "inextricably intertwined" with issues which have actually been decided. O'Connor's state court decisions did not rule on federal issues raised so were not inextricably intertwined with the decision. (*Hachamovitch v. Debuono [1998, 2nd.Cir.]159 F.3d 687*)

5) Challenging the judicial process, rather than the decision, does not bar Rooker-Feldman. The Feldman decision illustrates the distinction where plaintiffs were allowed to challenge the constitutionality of the rule under which they had been denied bar admission. (Feldman supra 487-88), "while not allowing them to challenge the denial itself. If they prevailed on their challenge to the rule, they might have obtained a new hearing." (*Van Harken v. Chicago [1997-7th. Cir.]103F.3d1346*).

6) Civil rights violations may be exceptions to the Rooker-Feldman doctrine.

The civil rights violations (42 U.S.C.S. 1983, 1985) and conspiracy issues in the instant case should therefore not have been dismissed under the Rooker-Feldman doctrine. ALSO:

A new California statute AB 2700 (stats 2000) Ed. Code 22119.2 has recently allowed exactly what Appellant had requested of the courts. (A-5,6) This statute should have been considered in the federal court's decision. (*Bradley v. Richmond School Bd. (1974) 416 U.S. 696*) The unwritten and uncommunicated policy of the STRS of 1993 and the lack of a statute specifically supporting that policy has now been changed with a written policy and a statute both of which support appellant's contentions of what was statutorily required in 1993. When no statute existed, a judge was not prevented from drawing two judicial salaries in

spite of the passage of *ex post facto* statutes by the legislature. The retroactive statutes denied the judge his contractual rights. *(Mascio v. Public Employees Retirement System of Ohio [6th Cir. 1998] 160 F.3d 310)*

The instant conspiracy issue was not inextricably intertwined with state court decisions (*Long v. Shorebank [1999,10th Cir] 182 F.3d 548*) Individual defendants were not parties to state actions. The final conspiracy occurred after "O'Connor-2" decision.

"Under certain circumstances, one of which is after-discovered fraud, relief will be granted against judgments regardless of the term of their entry." *Hazel-Atlas Glass v. Hartford-Empire (1944) 322 U.S. 238*

Res judicata does not apply if the issues are different and/or the original case was not decided on the merits. Both the "O'Connor 2" and the federal case ruled that the issues were *res judicata* however the issues presented to the California courts in "O'Connor 2" and to the federal courts did not deal with the same issues as the O'Connor 1 case, which dealt solely with pre-retirement issues. The O'Connor 2 and the federal cases dealt with the lack of due process in O'Connor 1 (the state's perjury and the application of non-retroactive *ex post facto* statutes that changed a contract between appellant and the State of California.) Also the conspiracy and civil rights issues were not factors in the "O'Connor 1" cases. In *Lawlor v. National Screen Service ([1955] 349 U.S. 322)* the Supreme Court reversed the Third Circuit's ruling of *res judicata* because:

> "the court found that petitioners were not suing upon the same cause of action as that which they had previously settled... While both suits involved the same wrongful conduct, the court held that because the current suit was based on conduct

which occurred after the settlement, alleged new antitrust violations, and involved a change in respondents alleged monopoly.

According to *Hoffman v. Blaski (1960) 363 U.S. 335* for *res judicata* to not apply a case must be "fully heard . . .on the merits" and "in the absence of fraud." "It is the general rule that issue preclusion attaches only when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment."*(Arizona v. Calif. [2000] 530 U.S .392)*

CONCLUSION

For the above noted reasons the writ should be granted.

APPENDIX

APPENDIX

APPENDIX A

FEDERAL AND CALIFORNIA CONSTITUTIONAL AND STATUTORY PROVISIONS

(Essential provisions are emphasized)

FEDERAL U.S. CONSTITUTION

Article II

Sec. 9 . . . No Bill of Attainder or ex post facto Law shall be passed.

Sec. 10. No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

Article IV

Section. 2.The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.

AMENDMENT V

No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL STATUTES

26 U.S.C. 411

Minimum vesting standards

(a) General rule

(2) Employer contributions

A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) 5-year vesting

A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) 3 to 7 year vesting

A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

42 USC Sec. 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

42 USC Sec. 1985 Conspiracy to interfere with civil rights

(1) Preventing officer from performing duties

> . . . if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal protection of the laws;

(3) Depriving persons of rights or privileges

> . . . or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

CONSTITUTION OF THE STATE OF CALIFORNIA

ARTICLE 9 EDUCATION

SEC. 6. . . .The Public School System shall include all kindergarten schools, elementary schools, secondary schools, technical schools, and state colleges, established in accordance with law and, in addition, the school districts and the other agencies authorized to maintain them.

CALIFORNIA STATUTES

Education Code 22115. (First of two; Operative term contingent)"Compensation earnable"

(a) "Compensation earnable" means the annual creditable compensation that a person would earn in a school year if he or she were employed on a full-time basis and if that person worked full time in that position.

HISTORY:

Added Stats 1994 ch 933 § 5 (AB 3171), effective September 27, 1994, operative until January 1, 1995, ch 933 § 5.5 (AB 3171), effective September 27, 1994, operative January 1, 1995. Amended Stats 1995 ch 390 § 3 (AB 1122), operative July 1, 1996; Stats 1996 ch 634 § 8 (SB 2041); Stats 1997 ch 482 § 2 (SB 471).

NOTES:

FORMER SECTIONS:

Former § 22115, similar to the present section, was added Stats 1993 ch 893 § 2, amended Stats 1994 ch 193 § 1, and repealed Stats 1994 ch 933 § 2, effective September 27, 1994.

NOTE-

Stats 1995 ch 390 provides:

SEC. 12. The provisions of this act shall become operative on July 1, 1996.

Education Code 22119.2. (First of two; Operative term contingent)"Creditable compensation"

HISTORY:

Added Stats 1996 ch 1165 § 7 (AB 3032), operative July 1, 1996.

Amended Stats 1997 ch 482 § 3 (SB 471); Stats 1999 ch 939 § 10 (SB 1074); Stats 2000 ch 1021 § 4 (AB 2700); Stats 2001 ch 803 § 1 (SB 501), operative term contingent.

HISTORICAL DERIVATION:

Former Ed C § 22114, as added Stats 1994 ch 933 § 3.

Education Code 22119.2 (Stats 2000)

LEGISLATIVE COUNSEL'S DIGEST
FEBRUARY 25, 2000

AB 2700, as introduced, Lempert. State teachers' retirement.

Existing law defines creditable compensation for purposes of the Defined Benefit Program established by the State Teachers' Retirement Law. That definition excludes money paid for service performed in excess of the full-time equivalent for the position and money paid for overtime or summer school service and aggregate service performed as a member in excess of one year of service credit for any one school year. . .

The bill would also revise and recast the definition of creditable compensation. The bill would delete the provisions described above that specifically exclude money paid for service in excess of the full-time equivalent for a position, for overtime and summer school service, and for aggregate service in excess of one year of service credit for any one school year. The bill would also specifically exclude from that definition compensation that is not payable in cash.

Education Code 22119.2. "Creditable compensation"

(a) "Creditable compensation" means remuneration that is payable in cash by an employer to all persons in the same class of employees and is paid to an employee for performing creditable service. Creditable compensation shall include:

(1) Salary paid in accordance with a salary schedule or employment agreement.

GOVERNMENT CODE 20635. If a member concurrently renders service in two or more positions, one or more of which is full time, service in the part-time position shall constitute overtime. If two or more positions are permanent and full time, the position with the highest payrate or base pay shall be reported to this system. This provision shall apply only to service rendered on or after July 1, 1994.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT J. O'CONNOR
Plaintiff,

V.

STATE TEACHERS RETIREMENT SYSTEM, ET AL.
Defendants.

CV-00-10604 LGB (BQRx)

ORDER GRANTING DEFENDANTS' MOTION T0 DISMISS.

I. INTRODUCTION

In the instant lawsuit, Plaintiff challenges the calculation of his retirement allowance by the State Teachers, Retirement System and two previous state court decisions on the matter. Defendants bring a motion to dismiss the First Amended Complaint and a motion to strike. Plaintiff brings a motion for default judgment or summary judgment.

II. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Robert O'Connor, is a retired teacher formerly employed by both the Los Angeles Unified School District ("LAUSD") and the Los Angeles Community College ("LACC"). *See* First Am. Compl. at ¶¶ 9, 13, 14. Retirement withdrawals were taken from Plaintiff's paychecks by both employers and deposited with Defendant State Teachers' Retirement System ("STRS") *See id.* at ¶¶ 18, 20. Plaintiff applied to the STRS for retirement allowances on both positions but was credited only the benefits from his position at the LACCD, which totaled one retirement allowance for one position. *See id.*

Plaintiff insisted that the STRS should compute his service retirement allowance based on the sum of the two salaries immediately preceding his retirement. Two administrative law hearings and appeals arose from the dispute. *See id.* ¶ 24.

Pursuant to Plaintiff's request, the first administrative hearing was held on July 27, 1993. *(See id.* 25, Ex. N.) On November 10, 1993, the STRS adopted the Proposed Decision of the administrative law court, which concluded that the STRS properly calculated Plaintiff's retirement credits. *(See id.* Ex. H.) Plaintiff alleged, and still alleges, that the decision of the administrative law court was based on the perjury of a witness for the STRS. (*See id.* at ¶ 26.) Plaintiff filed a Writ of Administrative Mandate in Los Angeles Superior Court on December 8, 1993. Plaintiff retired on January 8, 1994. (*See id* at ¶ 25.) The Petition for Writ was denied on March 26, 1994.

Plaintiff filed an appeal with the California Court of Appeal. The California Court of Appeal affirmed the conclusion of the administrative law court in *O'Connor v. State Teachers Retrirement System,* 43 Cal.App.4th 1610 (1996)*("O'Connor I").* Based on its interpretation of the State Teachers' Retirement Law, the Appellate Court held that the law requires the STRS to calculate Plaintiff's retirement allowance based on the aggregate of the teacher's salaries up to the equivalent of a single, full-time position. See *O'Connor,* 43 Cal.App4th at 1627. The Court also rejected Plaintiff's allegations that the LAUSD violated due process and equal protection by crediting less hours compared to other school districts. *See id.* at 1625. On June 26, 1996, the California Supreme Court denied Plaintiff's Petition for Review. *See id.* at 1627. Plaintiff has since claimed that the decision in *O'Connor I* was based on an ex post facto statute. *See* First Am. Compl. ¶ 29.

Plaintiff requested a second administrative hearing after allegedly discovering that the testimony of a witness for STRS was perjurious. (*See id* at ¶ 36.) This hearing occurred on January 28, 1997. The STRS adopted the administrative law court's Proposed Decision, favorable to Defendants, on September 11, 1997. Plaintiff filed a second Writ of Administrative Mandate in Sacramento Superior Court. The Petition was heard and denied on April 3, 1998 on res judicata grounds on the basis of *O'Connor I*. (*See id* ¶ 47, Ex. O.) Plaintiff appealed to the California Court of Appeal for the second time. (id. 11 36, 48.) On January 31, 2000, in an unpublished decision, the Court of Appeal affirmed the lower court's determination that the matter was barred by res judicata *("O'Connor II").*[1] *See id* at 1 48. The issues before the Appellate Court in *O'Connor II* included: (1) whether Plaintiff's due process rights were violated by the alleged perjury; (2) whether the ex post facto statutes were impermissibly relied upon in administrative hearings and the lower court; and (3) the alleged failure of the STRS to return excess contributions to Plaintiff as required by the decision in *O'Connor I*. (*See id* at ¶¶ 36-38, 39, 40-42.) The California Supreme Court denied Plaintiff's Petition for Review of *O'Connor II* on May 10, 2000. (*See id* at ¶ 48.)

Plaintiff filed his Complaint in federal Court on October 3, 2000. On October 24, 2000, the Court ordered Plaintiff to file a more definite statement in the form of an amended complaint due to the verbosity and vagueness of the original complaint. Plaintiff filed a First Amended Complaint on November 8, 2000.

Plaintiff states twenty-three claims, although each

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[1] Although Plaintiff refers to the decision in O'Connor II in his First Amended Complaint, neither party has filed the O'Connor II opinion for the Court's verification and review.

claim actually includes several causes of action. In essence, Plaintiff alleges claims of abuse of fiduciary duty, unjust enrichment, breach of contract, contempt of court orders, conspiracy, and violation of the California Constitution, various provisions of the Education Code, the Internal Revenue Code, the Fair Labor Standards Act, due process rights under the Fourteenth Amendment and the takings clause of the Fifth Amendment of the United States Constitution. (*See* First Am. Compl. ¶¶ 62-84.) Plaintiff's factual contentions are that the Defendants failed to properly calculate retirement benefits and to return excess contributions to retired teachers, failed to follow statutes governing the STRS, failed to notify STRS members of the application of an unwritten ex post facto policy, failed to require premium overtime pay for Plaintiff, wrongly defined "overtime," failed to treat Plaintiff as other teachers are treated in other districts, and conspired to present perjurous testimony in *O'Connor I* and *II*. (*See id.*) In sixty-nine paragraphs in the prayer for relief, Plaintiff also makes numerous requests for declaratory judgment favorable to his position on the factual contentions mentioned. (*See id.* at Prayer 4-8, 12-53.) Plaintiff does not identify which claims are asserted against which Defendants, although most accusations appear to be targeted against the STRS.

Defendants California State Teachers' Retirement System, California Attorney General, James Mosman, and Peter Hough have filed a motion to dismiss and a motion to strike. Defendant Los Angeles Community College District joined in the motions on May 25, 2001. Plaintiff has filed a motion for default judgment or summary judgment.

III. LEGAL STANDARD FOR RULE 12(b)(6) MOTION TO DISMISS

Federal Rule of Civil Procedure 12 (b) (6) provides for dismissal when a complaint fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). A complaint fails to state a claim if it does not allege facts necessary to support a cognizable legal claim. See *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir - 1990) ; *Robertson v. Dean Witter Reynolds, Inc.,* 749 F.2d 530, 533 -34 (9th Cir. 1984) .

In reviewing a Rule 12 (b) (6) motion, the court must presume the truth of the factual allegations in the complaint and draw all reasonable inferences in favor of the nonmoving party. See *Parks Sch. of Bus., Inc. v. Symington,* 51 F.3d 1480, 1484 (9th Cir. 1995); see also *Usher v. City of Los Angeles,* 82 8 F.2d 556, 561 (9th Cir. 1987) Dismissal under 12 (b) (6) is appropriate "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984) (citing *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)) (dismissal appropriate only where "plaintiff can prove no set of facts in support of his claim which would entitle him to relief") ; see also *Ascon Properties, Inc. v. Mobil Oil Co.,* 866 F.2d 1149, 1152 (9th Cir. 1989). The issue is not whether the plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the plaintiff's claim. See *Usher,* 828 F.2d at 561.

Unless the Court treats a Rule 12 (b) (6) motion as a summary judgment motion, the Court is prohibited from considering material outside the complaint. See *Levine v. Diamanthuset, Inc.,* 950 F.2d 1478, 1483 (9th Cir. 1991). However, documents not mentioned in the complaint or whose contents are alleged in a complaint

but not attached, but which are essential to a plaintiff's case and the authenticity of which is uncontested, can be considered by the Court in ruling on the motion. See *Parrino v. FHP, Inc.,* 146 F.3d 699, 706 (9th Cir. 1998); *Branch v. Tunnell,* 14 F.3d 449, 454 (9th Cir. 1994). A motion to dismiss may be based on the defense of res judicata based on records of which the court may take judicial notice. See *Day v. Moscow,* 955 F.2d 807, 811 (2nd Cir. 1992).

IV. ANALYSIS

1. Federal Review of State Court Proceedings

In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), the Supreme Court ruled that a lower federal court could not exercise appellate jurisdiction over a final decision of a state court. Thereafter coined the *Rooker-Feldman* doctrine, the doctrine recognizes that lower federal courts lack subject matter jurisdiction over challenges to state court judgments. See *Rooker v. Fidelity Trust Co.,* 263 U.S. 412, 416 (1923). The proper place to seek such review is the United States Supreme Court. *See* 28 U.S.C. § 1257. The doctrine applies even when the challenge to the state court decision involves federal constitutional issues. *Worldwide Church of God v. McNair,* 805 F.2d 888, 890 (9th Cir. 1986). The test to determine whether the doctrine applies is whether the claims brought in federal court are "inextricably intertwined" with the decision of the state proceeding, such that a decision by the federal court would require reviewing the propriety of the state court's decision. *Id.* at 892, citing *Feldman,* 469 U.S. at 483-84 n.16. Thus, "[t]he *Rooker-Feldman* doctrine forecloses not only straightforward appeals but also more indirect attempts by federal plaintiffs to undermine state court decisions." *Lemonds v. St. Louis County,* 222 F.3d 488, 492 (8th Cir. 2000) Therefore, the

doctrine may apply even when state and federal claims are not identical. *See id.* at 493.The *Rooker-Feldman* rule is jurisdictional and, thus, may be raised by the Court *sua sponte*. See *Doctor's Assocs., Inc. v. Distajo,* 107 F.3d 126, 137 (2nd Cir. 1997).[2]

In *O'Connor I* and *O'Connor II*, the administrative law courts and the state courts adjudicated the legality of the relevant provisions of the State Teachers' Retirement Law on calculating retirement credits and overtime work, the propriety of the STRS' calculation of Plaintiff's retirement benefits, and the due process and equal protection implications of the calculation. In O'Connor II, the state court heard Plaintiff's arguments regarding alleged perjurous testimony, ex post facto statutes, and STRS' failure to pay excess contributions.

Here, Plaintiff brings the same allegations, although reclothed in different legal theories, as brought in the state court proceedings. Plaintiff also raises evidentiary, procedural, and legally substantive challenges to the decisions in *O'Connor I* and *O'Connor II*. The Court finds that Plaintiff's numerous contentions in the instant suit are "inextricably intertwined" with the decisions of the state courts in O'Connor I and II, such that a decision by this Court would require review of the propriety of the state courts' decisions.

Plaintiff essentially seeks review of the decisions

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[2]Plaintiff opposes Defendants' motions on the ground that they did not timely appear with an answer or motion pursuant to Federal Rule of Civil Procedure 12 (a) (1) (A) . The Court does not directly address Plaintiff's contention for two reasons. First, the date of the service of the summons and the amended complaint is disputed between the parties. Second, the case poses jurisdictional problems which the Court can raise sua sponte without the instant motions.

entered against him in two state court decisions. Plaintiff's fourteenth and fifteenth "causes of action" directly challenge the state court decisions. *See* First Am. Compl. ¶ 75 ("Material perjury of the STRS witness, cited 3 times in appellate decision, denied due process guarantees to plaintiff."); ¶ 76 ("Lack of due process due to the use of 3 ex post facto statutes, cited 10 times by the appellate court in *'O'Connor 1'*, and held to be res judicata in *'O'Connor 2.'"*). Although Plaintiff's First Amended Complaint occasionally invokes distinct constitutional provisions, as a substantive matter, the suits all challenge the basic fairness of the State Teachers' Retirement Law and its application to Plaintiff. Thus, the new constitutional arguments seem to be "nothing more than creative attempts to reclothe the failed due process claim in new constitutional garb." *Lemonds*, 222 F.3d at 494. [P]laintiff "cannot by artful pleading obtain a hearing of disguised state court appeals that would otherwise be subject to a *Rooker-Feldman* bar." *Id.* Here, a decision favorable to Plaintiff would mandate a finding that the state court decisions were erroneous. Because resolution of the instant claims would require the Court to review the state court proceedings, the Court lacks jurisdiction in this case under the *Rooker-Feldman* doctrine.[3]

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[3]Plaintiff contends that the same matters were brought to the attention of the state courts but "the state courts at every level in both series of cases refused to rule on the federal laws which were argued by the plaintiff." First Am. Compl. ¶ 22, 33, 34, 47, 48, 51; *see also* Pl.'s Opp'n at 4. Based on a review of *O'Connor I*, the Court does not agree with Plaintiff's contention. Furthermore, the *Rooker-Feldman* doctrine bars the Court from reviewing the state court decisions even when the challenge involves federal constitutional issues. See *McNair*, 805 F.2d at 891. Federal district court is not the proper place for Plaintiff to seek such review.

2. Application of Res Judicata

Under California law, res judicata precludes a plaintiff from litigating a claim if (1) the claim relates to the same "primary right" as a claim in a prior action, (2) the prior judgment was final and on the merits, and (3) the plaintiff was a party to the prior action. See *Trujillo v. County of Santa Clara*, 775 F.2d 1359, 1366 (9th Cir. 1985). "[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant, then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery." *Eichman v. Fotomat Corp.*, 147 Cal.App.3d 1170, 1174-75 (1983). A final judgment on the merits bars relitigation of all issues that were actually litigated as well as all issues that might have been litigated so that a federal court is precluded from considering federal constitutional issues which were not, but which could have been, submitted and determined by the state court. See *Angle, v. Bullington*, 330 U.S. 183, 193 (1947). Thus, if a federal constitutional claim is based on the same asserted wrong as was alleged in the state court action and the parties are the same, res judicata will bar the federal constitutional claim even if it was not specifically asserted in the state court. See *Trujillo*, 775 F.2d at 1363. Section 1783 of Title 28 of the United States Code requires that federal courts give state court decisions the same full faith and credit that they would receive "in courts of such state." 28 U.S.C. § 1783. Thus, a prior state court adjudication has the same effect in federal court as it would in state court.

Here, Plaintiff is seeking to challenge the judgments entered against him in state court by claiming that he was subjected to unconstitutional treatment. Plaintiff's claims clearly derive from the same asserted wrong as that reviewed in the state court actions. Additionally,

Plaintiff's claims involve the same purported injury to Plaintiff, in not receiving certain retirement funds, and the same alleged wrong by the Defendants, by withholding the funds and conducting their defense in *O'Connor I* and *II*.[4] Thus the claims relate to the same "primary right" as in the prior actions, which were determined on the merits and were final judgments.

Res judicata bars the instant action although Plaintiff pleads certain distinct theories of recovery, seeks different forms of relief and/or adds new facts. See *Eichman*, 247 Cal.App.3d at 1174-75. Furthermore, the new claims and facts could have been submitted to the state courts, especially in *O'Connor II*. See *Angle*, 330 U.S. at 193 (1947). Plaintiff admits that some of the same constitutional issues were presented to the state courts for review. (See *Pl.'s Opp'n* at 4, 5.) Contrary to Plaintiff's argument, the fact that the opinions of the state courts did not include a discussion of every issue and claim presented by Plaintiff in each appeal does not save Plaintiff's case from res judicata. (*See id.* at 5, 10, 18.) Nor does this fact indicate that Plaintiff did not have a full and fair opportunity to litigate his claims in two previous state court actions. Plaintiff's claims are barred by res judicata.

Based on the foregoing, the Court dismisses Plaintiff's action. Having granted the motion to dismiss, the Defendants, motion to strike is moot. Accordingly, the

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[4] In his defense, Plaintiff claims that "Most of the alleged facts by the plaintiff are relative to what happened after retirement, including but not limited to the perjury and *ex facto* laws introduced by the STRS and the Attorney General at the initial hearings." Pl.'s Opp'n at 4

Court also declines to address Plaintiff's motion for default judgment or summary judgment.

V. CONCLUSION

For the foregoing reasons, the Court GRANTS the Defendants, motion to dismiss. Defendants' motion to strike and Plaintiff's motion for default judgment or summary judgement are moot.

Pursuant to Federal Rule of Civil Procedure 78 and Central District Local Rule 7.11, the Court hereby dispenses with oral, argument on this motion. The hearing that was noticed for June 11, 2001 at 10:00 a.m. is hereby VACATED. **Therefore, the parties shall not appear before this Court on June 11, 2001 at 10:00 a.m.**

IT IS SO ORDERED.
DATED: June 5, 2001

LOURDES G. BAIRD
United States District Judge

APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROBERT J. O'CONNOR, as an individual, All teachers who have left the STRS before retiring and have not been reimbursed their employers' contributions towards their retirements,
Petitioner - Appellant,

v.

JAMES MOSMAN; PETE HOUGH;
KEITH YAMANAKA;,
Defendants - Appellees,

STATE TEACHERS RETIREMENT SYSTEM;
LOS ANGELES
COMMUNITY COLLEGE DISTRICT;
LOS ANGELES UNIFIED SCHOOL DISTRICT;
ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA,
Respondents - Appellees.

No. 01-56209
D.C. No. CV-00-10604-LGB

MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
Lourdes G. Baird, District Judge, Presiding

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by Ninth Circuit Rule 36-3.

Submitted November 27, 2001**

Before: CHOY, SKOPIL and FERGUSON, Circuit Judges

Robert O'Connor appeals pro se the district court's dismissal of his complaint against California's State Teachers' Retirement System ("STRS") and related state agencies and officials. We have jurisdiction pursuant to 28 U.S.C. § 129 1. We review the district court's dismissal under Fed. R. Civ. P. 12(b)(6) de novo, *Zimmerman v. City of Oakland*, 255 F.3d 7345 737 (9th Cir. 2001), and we affirm.

O'Connor is a retired teacher formerly employed by the Los Angeles Unified School District and Los Angeles Community College. He disputed STRS's calculation of his retirement benefits in a number of actions before California administrative law courts and state courts. When he was unable to obtain the ruling he desired, O'Connor filed a complaint in the Central District of California. The district court dismissed O'Connor's action on two grounds. First, it concluded that dismissal was appropriate under the Rooker-Feldman doctrine. Second, it found that the action was barred by res judicata.

Notwithstanding O'Connor's arguments to the contrary, the district court correctly concluded that the *Rooker-Feldman* doctrine bars jurisdiction over this case. The district court could not grant the relief O'Connor was seeking without reviewing the state court's decision. As such, the claims in O'Connor's district court complaint were "inextricably intertwined" with the earlier state court decisions, and dismissal

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**This panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

was appropriate under the *Rooker-Feldman* doctrine.[1] See *Ahmed v. Washington*, 276 F.3d 464) 467 (9th Cir. 2001) (citations omitted); *Doe & Assocs. Law Offices v. Napolitano*, 252 F.3d 1026, 1030 (9th Cir. 200 1); see generally *Dist. of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923).

AFFIRMED.

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[1]Because the district court properly dismissed the action in accordance with the Rooker-Feldman doctrine, we need not address O'Connor"s claim that his action is not barred by res judicata.

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

ROBERT J. O'CONNOR, as an individual, All teachers who have left the STRS before retiring and have not been reimbursed their employers' contributions towards their retirements,
Petitioner - Appellant,

v.

JAMES MOSMAN, et al.,
Defendants - Appellees,

STATE TEACHERS RETIREMENT SYSTEM, et al...
Respondents - Appellees.

No. 01-56209

D.C. No. CV-00-10604-LGB
Central District of California, Los Angeles

ORDER

Before: CHOY, SKOPIL and FERGUSON, Circuit Judges

The panel, as constituted above, has voted unanimously to deny the petition for rehearing and recommend that the petition for rehearing en banc be denied.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition. for rehearing en banc are hereby DENIED.

APPENDIX E

Excerpts of the O'Connor 1 Appellate Decision

ROBERT J. O'CONNOR, Plaintiff and Appellant,
v.
STATE TEACHERS' RETIREMENT SYSTEM,
Defendant and Respondent.

L. EDMUND KELLOGG, Plaintiff and Respondent,
v.
STATE TEACHERS' RETIREMENT SYSTEM,
Defendant and Appellant.

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION THREE

43 Cal. App. 4th 1610; 51 Cal. Rptr. 2d 540;

March 28, 1996, Decided

CASE SUMMARY ——(Emphases added below)

PROCEDURAL POSTURE: Appellant teacher and teachers' retirement organization challenged orders by the Superior Court of Los Angeles County (California), which ruled in favor of the teacher in one action and in favor of the teacher's retirement organization in the second action. The cases were consolidated into one action, which addressed the proper calculation of the teachers' retirement allowances.

OUTCOME: The judgment in favor of the teacher was reversed and the judgment in favor of the teachers' retirement organization was affirmed. The court ruled that the teachers' retirement allowances had to be calculated on their salaries up to the equivalent of only one full-time job and that any excess remuneration was to be considered as noncreditable overtime.

CORE CONCEPTS -

JUDGES: Opinion by Aldrich, J., with Klein, P. J., and Kitching, J., concurring.

The trial court granted the writ finding in favor of Kellogg, that the calculation of his retirement allowance should be based on both full-time teaching positions. STRS has appealed. In the second action, under the same circumstances, the administrative law judge ruled, as had the administrative court in Kellogg's case, in favor of STRS, rejecting Robert J. O'Connor's challenge to STRS's method of calculation. However, unlike Kellogg's case, the trial court denied O'Connor's petition for writ of mandate. O'Connor filed this appeal.

p 1614

n1 While these cases were pending, the Legislature significantly reorganized the Education Code with the specific intent to "... clarify the State Teachers' Retirement Law and thus facilitate its administration. It is not the intent of the Legislature to make any substantive change in the law." (Historical and Statutory Notes, 26B West's Ann. Ed. Code (1994 ed) § 22000, p. 220; Stats. 1993, ch. 893, § 3. (Assem. Bill No. 1796).) Since 1993, the Legislature has further revised the law in ways which do not affect the outcome of this appeal. . . . Hereinafter, all statutory references shall be to the reorganized and renumbered version of the Education Code passed in 1993, unless otherwise noted.

FACTUAL AND PROCEDURAL SYNOPSIS

p. 1616 *The Hearings.*

Mark Oliver Johnson, an actuary with the firm of Milliman and Robertson which consults for STRS,

explained his firm conducts valuations to determine whether contributions are sufficient to meet demand. . . . *The actuarial assumptions are also based on STRS's definition and interpretation of full time, overtime and "compensation earnable."*

p. 1620

DISCUSSION

n5 In 1993, the Legislature amended section 22114, subdivision (a)(1) to add the italicized phrase: " 'Compensation' and 'salary,' for the purposes of determining benefits and contributions, mean: ... [P] (1) Remuneration in cash payable by the employer to the member *for actual work performed or time served, up to the full-time equivalent for the position.*" . . . (Stats. 1993, ch. 468, § 1 (Assem. Bill No. 631).) Accordingly, we construe the Legislature's purpose in amending section 22114, subdivision (a)(1) was to clarify that compensation would include remuneration up to *but no more than* the full-time equivalent for the position.

p. 1623

Remuneration paid in excess of the full-time equivalent for the position is therefore not creditable to retirement allowance. The statute considers such excess earnings to be "overtime." (§ 22151.) Money paid to an employee for overtime service is not included in the definition of compensation. (§ 22114, subd. (b)(2).) "Overtime" is defined as "the aggregate service performed as a member of the system in excess of the hours of work considered normal for employees on a full-time basis." (§ 22151, italics added.)

The logic behind our statutory construction is

further underscored by the fact, as noted by both administrative law judges and one trial court, money contributed to the system in excess of that which is creditable to retirement allowance **must be reimbursed at the time of retirement. (§ 22906.)** O'Connor's and Kellogg's arguments they were never informed they were contributing excess, noncreditable money to the system, is, in light of section 22906, unpersuasive. n8

O'Connor contends his second full-time position cannot be considered overtime without redefining "overtime" in violation of the statute, because both of his positions are considered full-time. O'Connor and Kellogg argue essentially only the employing school district, not STRS, can determine what is considered overtime.

Overtime, for purposes of the State Teachers' Retirement Law, is not defined as that which the *employer* considers overtime: it is the province of the Board to determine what pay is creditable to retirement. Section 22215 provides "[t]he *board* shall determine the service performed by members to be credited toward qualification for retirement, and shall fix retirement allowances, ..." (Italics added.) Furthermore, "compensation earnable" is defined as that compensation "*as determined by the board* that would have been earned by the member if he or she were engaged ... on a full-time [*1625] basis." (§ 22115,

p. 1625

subd. (a), (italics added.) STRS is actually precluded by statute from crediting O'Connor for work performed in *excess of that which is earnable as determined by the board*. (*Ibid.*)

p. 1626

STRS's actuaries calculated STRS had an unfunded obligation of $ 11 billion because the current members' contributions are less than that needed to meet the normal cost payment. In response, the actuary explained, the Legislature addressed this shortfall by enacting former sections 23402 and 23403, which, among other things, is designed to provide stable and full funding over the long term. Both former section 23402 and the actuaries' calculations are based on the assumption, among others, that final compensation was being calculated based on one full-time position or the equivalent thereof.

As of 1993, the system was "in a funded position," that is, members were contributing the exact percent of earned salary and the Fund is earning just the right interest rate so there will be sufficient amount of money to pay for the anticipated benefits. However, despite the efforts of the Legislature, "... if the earnable salary were to increase but just a matter of a few percentages on average, the system would no longer fund. [That is,] ... the $ 11 billion liability would increase to some level to which it would not be able to amortize, and the shortfall would continue to increase every year." Therefore, to allow the calculation of benefits based on two full-time positions would contradict and frustrate the intent of the Legislature, in enacting former section 23402 to make the Fund solvent.

DISPOSITION

The judgment in Kellogg v. STRS (No. BS025808) is reversed and the trial court is directed to recall the writ of mandate issuing over date of February 16, 1994. The judgment in O'Connor v. STRS (No.

BS026387) is affirmed. Each party to bear his own costs.

Klein, P. J., and Kitching, J., concurred.

A petition for a rehearing was denied April 23, 1996, and the petitions of both appellant and respondent for review by the Supreme Court were denied June 26, 1996. Mosk, J., did not participate therein.

APPENDIX F

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA THIRD APPELLATE DISTRICT

ROBERT J. O'CONNOR
Plaintiff and Appellant,

v.

STATE TEACHERS RETIREMENT SYSTEM, Et al
Defendants and Respondents.

Super. Ct. No. 97CS02781)

p.5 (Citing the O'Connor I decision). . . "to allow the calculation of benefits based on two full time positions would . . . make the fund insolvent." (Id at p. 1626)

Notwithstanding the decision in O'Connor I, in November and December 1996, O'Connor asked STRS to reconsider its position . . . (because) . . . (2) recently enacted Government Code section 20635 supported his interpretation of the State Teachers Retirement Law; and, (3) STRS ignored the intent of state and federal pension laws.

p. 6 . . . The ALJ determined the decision in O'Connor I barred litigation of all other issues pertaining to a calculation based on two full time teaching positions.

p. 10 ". . . it is the province of the Board to determine what pay is creditable to retirement." (O'Connor I, 43 Cal.App.4th at pp. 1623, 1624, 1627)

p. 11 . . . The second aspect of the doctrine of res judicata involves issue preclusion, or collateral estop-

pel, which applies to a subsequent suit between the parties on different causes of action. "Collateral estoppel prevents the parties from relitigating any issue which was actually litigated and finally decided in the earlier action. . . The issue decided in the earlier proceeding must be identical to the one presented in the subsequent action." (Worton v. Worton, supra, 234 Cal.App. 3d at p. 1647)

p. 12 . . . Accordingly, O'Connor is barred from relitigating the questions of statutory interpretation . . . He may not challenge the holding in O'Connor I by citing state and federal statutes he could have cited in an earlier action.

p. 19 . . . "other arguments concerning his retirement allowance are without merit." Included are arguments that: . . . (2) he was entitled to the employers' excess contributions classified as deferred compensation; . . .

. . . Thus, the question of fraudulent testimony was not considered by the ALJ or the trial court, and is not subject to review in this appeal.

APPENDIX G

BEFORE THE
TEACHERS' RETIREMENT BOARD
STATE OF CALIFORNIA
PAUL HOGAN,
ADMINISTRATIVE LAW JUDGE

IN THE MATTER OF THE REQUEST TO CALCULATE A FINAL COMPENSATION FOR RETIREMENT PURPOSES USING THE ACCUMULATED SALARY FROM TWO FULL-TIME POSITIONS,

ROBERT J. O'CONNOR,
Respondent.

NO. 7821
L-60440

TRANSCRIPT OF PROCEEDINGS
LOS ANGELES, CALIFORNIA
TUESDAY, JULY 27, 1993

MR JOHNSON: IN ADDITION TO THAT, THE SYSTEM IS BEHIND IN ITS FUNDING. IN ADDITION TO PAYING THE ONGOING COST OF EACH MEMBER OF EVERY YEAR, WE ARE BEHIND, AS OF THE LAST VALUATION DATE, OF ABOUT $11 BILLION. THE EDUCATION CODE WAS AMENDED SEVERAL YEARS AGO TO PROVIDE' CONTRIBUTIONS UNDER THE ELDER FULL FUNDING ACT WHICH WILL NOW FUND THAT UNFUNDED OBLIGATION OVER THE NEXT 38 YEARS.

WHAT WOULD HAPPEN, IF A LARGE NUMBER OF MEMBERS WERE ALLOWED TO USE POSITIONS IN EXCESS OF ONE FULL-TIME POSITION, BE IT A SECOND FULL-TIME POSITION OR A PART-TIME POSITION IN ADDITION TO THE FULL

TIME POSITION, IS THAT THE FUNDING OF THE SYSTEM, IN MY OPINION, WOULD BE IN JEOPARDY BECAUSE WE HAVE BEEN MAKING OUR PREDICTIONS AND. OUR REPORTS TO THE BOARD AND THE GOVERNOR AND THE LEGISLATURE BASED UPON ONE FULL-TIME POSITION.

MR. YAMANAKA: I HAVE NO FURTHER QUESTIONS.

THE COURT: YOU MAY CROSS-EXAMINE.

CROSS-EXAMINATION

BY MR. O'CONNOR:

Q ARE THE ACTUARIAL ASSUMPTIONS WRITTEN BY THE DISTRICT ON HOW YOU SHOULD HANDLE THE RETIREMENTS?

A NO. THE WRITTEN ASSUMPTIONS -

THE COURT: YOU'VE ANSWERED THE QUESTION. WAIT FOR THE NEXT QUESTION.

HE ANSWERED. HE SAID, "NO."

BY MR. O'CONNOR:

Q SO THERE IS NO FORCE OF LAW IN WHATEVER THESE

APPENDIX H

Retired Educator
(Summer 1999 - Volume 9, No.1)

"CALSTRS FUNDING GOES OVER THE TOP"

Higher Investment Returns Shorten Repayment Period

The California State Teachers' Retirement System hit the goal of every pension system. CalSTRS is fully funded as of June 30, 1998, according to the latest actuarial valuation. This means on that date CaISTRS had all the money needed to cover the cost of the benefit plan in effect in 1998.

This milestone was reached ahead of the 1997 valuation's prediction. At that time, it was estimated the unfunded liability would be paid, or amortized, in three years.

A higher than anticipated investment rate of return is the primary reason for the quicker than expected fully funded status. The market value of the CaISTRS investment portfolio reached more than $88 billion on June 30, 1998. This is an increase of 18 percent and more than $13 billion from the previous year. The, current market value of the investment portfolio exceeds $96 billion.

"The attainment of this long-sought goal is both gratifying and energizing," said Teachers' Retirement Board Chair Emma Zink. "The strong funding status gives us opportunities to further improve benefits without jeopardizing the foundation of the Teachers' Retirement Fund."